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Case No 402/1984IN THE SUPREME COURT OF SOUTH AFRICAAPPELLATE DIVISION

In the matter between:

CLAN SYNDICATE (PROPRIETARY) LIMITED

Appellant

and

RONALD JOHN REID PEATTIE

First Respondent

ROBERT JOHN RICHARD PEATTIE

Second Respondent

RAYMOND LESLIE FREESE

Third Respondent

CORAM: JOUBERT, BOTHA, HEFER, BOSHOFF JJA
 et GALGUT AJA

HEARD: 21 FEBRUARY 1986

DELIVERED: 13 MARCH 1986

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

The appellant is the owner of a farm in the midlands of Natal, on which there are extensive plantations of pine, eucalyptus and wattle trees. Adjoining the appellant's property, along its south-eastern boundary, is the farm Broughton, of which the respondents are the lessees, and on which there are also timber plantations. On 26 August 1980 a fire broke out in a pine forest on the appellant's property. Fanned by a very strong north-westerly wind, it expanded and spread rapidly in a south-easterly direction, destroying close on a 1 000 hectares of the appellant's timber. It crossed the boundary on-to Broughton, where it destroyed about 70 hectares of the respondents' gum and wattle plantations. As a result, the respondents suffered damage in an amount of R26 000, as quantified later by agreement between the parties. The respondents brought an action for damages against the appellant in the Natal Provincial Division,

/alleging ...

alleging negligence on the part of the appellant's employees in relation to both the starting of the fire and its spreading onto Broughton, and relying on the presumption of negligence provided for in section 23 of Act 72 of 1968. The action was tried by LAW J, who upheld the respondents' claim and granted judgment against the appellant accordingly. Against that judgment the appellant now appeals to this Court, leave to do so having been granted by the trial Judge.

Section 23 of Act 72 of 1968 provides as follows:

"Notwithstanding anything to the contrary in any law contained, whenever in any proceedings under this Act or at common law the question of negligence in respect of veld or forest fires arises, negligence shall be presumed unless the contrary is proved."

It is common cause that the statutory presumption is applicable in the context of the facts of the present case. This entails that the appellant at the trial

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bore the onus of proving on a balance of probabilities that its employees were not negligent either in causing the fire to start or in failing to prevent its spreading onto Broughton. The appellant sought to discharge the burden of proof by adducing the evidence of a number of its employees and certain other witnesses. On that evidence the trial Judge found that the appellant had failed to discharge the onus. It is that finding that falls to be considered in this appeal.

As I have mentioned, the fire occurred on 26 August 1980. The evidence reveals that in the month of August the so-called fire season in that area reaches its peak. The fire season extends over the dry winter months, from about May until the onset of the summer rains. During that period there is a high risk of severe fire damage occurring in the timber plantations, because of the dry conditions prevailing in the forests. The appellant's forest estates manager, Swart, who has

/had ...

had many years' experience in forestry, said in his evidence that in August the entire management of the appellant were acutely aware of the danger of fire.

With specific reference to 26 August 1980, Swart testified that the pine forest in which the fire started was very dry, "you had a kind of tinderbox there", which required especially careful attention, and that the situation was particularly dangerous. The appellant's general manager, Gibbs, said that on that day there was "a very incendiary" and "dangerous" situation in the area where the fire started.

It has been mentioned also that the fire was fanned by a very strong north-westerly wind. This wind is known in that locality as a berg wind. From the evidence it is apparent that in the dry season the occurrence of a berg wind is dreaded by everyone concerned with forestry, because of the awesome rapidity with which it can turn a tiny flame into a raging

/conflagration ...

conflagration that is practically unstoppable until the wind subsides. Swart said in his evidence that berg winds were common at that time of the year; he estimated that there could be "up to between 5 and 8 per winter period." On the day in question he arrived at the scene of the fire shortly after it had started. He described the state of the wind at that stage as "an exceptionally high velocity" berg wind, "very dry and very hot", and "exceptionally hazardous."

It is clear on all the evidence that the wind had already reached the dimensions described by Swart, at the time when the fire started. Counsel for the appellant sought to argue, however, that there was a sudden increase in the velocity of the wind very shortly before the start of the fire. In support of the argument counsel pointed to passages in the evidence of the witnesses Gibbs, Swart, and Byrne, the appellant's harvesting manager, in which they gave their impressions of

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the condition of the wind at various stages of the morning prior to the outbreak of the fire. I do not consider it necessary to discuss the passages referred to. For the purposes of my judgment, in view of what is to follow later, the following observations will suffice. On the evidence of Gibbs and Byrne the fire started at approximately 10 o'clock that morning. The respondents called a witness, Melle, who has had many years' experience in forestry. On the morning in question he went from Pietermaritzburg to his employer's timber plantations, which are situated some 4 or 5 km to the north-east of the appellant's property. He arrived there at roughly 8 or 8.30 a.m. He noticed that at that stage the wind, which he had observed earlier was blowing from the north-west, "was starting to pick up quite alarmingly", and that it was "starting to become an abnormal wind." He said that by about 9 o'clock it was "quite obvious" to him that that day

/"was ...

"was going to be one of those days that the wind was going to blow", which confirmed the feeling he had had early that morning that "it was going to be a nasty fire day", to the extent that he "was frightened of the conditions". The general tenor of Melle's evidence was put to the appellant's witness, Gibbs, in cross-examination, and he accepted it, in effect agreeing that by not later than 9 o'clock it had become apparent that that day was going to be a particularly dangerous one. In the result, at best for the appellant, bearing in mind the incidence of the onus, the conduct of the appellant's employees in relation to the issue of negligence falls to be assessed upon the footing that the particularly hazardous weather conditions that existed when the fire broke out, had already manifested themselves about an hour before the fire started.

The scene is now set for a consideration of how the fire started and what was done to stop it. The

/appellant ...

appellant called only one witness who was close to the spot where the fire started, at that time. This was Magagula, the supervisor of a gang of 11 labourers engaged in tree-felling operations. He said that the gang were having breakfast at the side of a road, except for one of them, Ndlela, who was felling trees by means of a chain saw some 40 metres from the road-side. Magagula noticed smoke coming from the pine needles on the ground about 4 to 5 paces behind Ndlela, at the place where he had just felled a tree prior to moving on to the next tree, where he was working at that moment. Magagula went to investigate, apparently being unsure at that moment whether the smoke was of the kind normally emanating from a chain saw when in use, or whether it was smoke coming from a fire. He found a fire covering an area of about 4 paces by 3 paces. He shouted to Ndlela and called the other members of the gang. They broke branches and tried to beat out the fire. This was

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to no avail. It is clear from other evidence led by the appellant that in the prevailing conditions there was no hope of quenching the fire in that way. Magagula said that there was a knapsack pump at the roadside. This was the only piece of fire-fighting equipment the gang had with them. Magagula fetched it and used it in an attempt to extinguish the fire, but, as he said, "it was ineffective because the wind was too strong and the fire had spread". This accords with the evidence of Swart and Byrne: Swart said that a knapsack spray would have been of no use 2 to 3 minutes after the start of the fire, while Byrne said that in the prevailing conditions it could have stopped the fire probably only if it had been applied within 30 seconds of the start of the fire. It is clear, therefore, that after Magagula had ascertained that a fire had broken out, there was nothing that he and his gang could have done, with the means at their disposal, to prevent

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the fire from spreading.

Byrne, who was in charge of the tree-felling operations on the appellant's estate, was travelling in his "bakkie" on a road about 2 km away from the place where the fire started, when he noticed a thin spiral of smoke at that point. He immediately raised the alarm: using the two-way radio he had with him, he reported the fire to the "operations room", from where the fire-fighting procedures on the property are organised and controlled. He hastened to the scene, and on his arrival there saw that flames, driven by the fierce wind, were racing very rapidly along the top of the thick bed of dry pine needles on the forest floor. He had fire-fighting equipment on his vehicle (knapsack sprays, "beaters" and rakes), but he saw at once that it would be futile to try and stop the fire by those means. In fact he said that when he saw how quickly the fire was running, he realised "that we would never get it out in the field where it was

/actually ...

actually burning when I saw it." So he drove on, to an area beyond the fire, with the intention of trying to stop its spreading by means of back-burning. One of the appellant's fire-fighting units, called the fire-stop, arrived on the scene. It was equipped with a water tank, water hoses, and other fire-fighting devices. According to Byrne's estimate, it arrived about 10 minutes after he had raised the alarm. Byrne put it and its crew to use in the back-burning operation. He did not succeed in halting the spread of the fire. In the meantime Swart, who was in charge of the fire-fighting operations on the estate, also arrived on the scene, as did other fire-fighting units of the appellant. Further attempts were made to stop the fire by means of back-burning. All of them failed. It was not until late in the afternoon, after the fire had done its damage on Broughton, and after the wind had subsided, that the fire was brought under control.

/Swart ...

Swart gave detailed evidence of the general precautions taken by the appellant to prevent the outbreak and spread of fires on its property and of the fire-fighting equipment, crew, and procedures employed by it. There is no need to discuss this evidence. It was fully analysed in the judgment of the trial Judge, who came to the conclusion that it was

".... clear that the spread of the fire and the resultant damage suffered by plaintiffs was not caused as a result of any deficiency in defendant's equipment or as a result of the defendant's failure to take adequate steps to quell the fire after it was reported to the control room by Byrne."

This conclusion is fully justified by the evidence.

It follows from what has been said so far, that it is of crucial importance in this case to consider next what the actual cause of the fire was, and then to examine the question of negligence on the part of the appellant's employees in that context.

/At ...

At the outset, it will be convenient to deal briefly with the appellant's failure to call Ndlela as a witness. Evidence was given by Swart as to the possibility of tracing Ndlela to the place where he went to live after he had left the appellant's service. I do not propose to discuss this evidence. Suffice it to say that it falls short, in my view, of establishing that it was not possible for the appellant to procure Ndlela's attendance as a witness at the trial, had it wished to do so. Counsel for the respondents did not argue for an adverse inference to be drawn against the appellant from its failure to call Ndlela, but contended that such failure constituted an hiatus in the appellant's case. That is true, of course. Hypothetically, Ndlela's evidence might have revealed negligence of some kind on his part in relation to the causation of the fire, and in that sense the appellant made no effort to discharge the burden of proving that Ndlela was not negligent.

/Whether ...

Whether an adverse ultimate finding against the appellant could be made on this narrow ground is a question I do not propose to consider. On the basis of Magagula's evidence as to what he observed regarding Ndlela's activities from the road-side, it might be said that the notion of negligent conduct on the part of Ndlela was prima facie negatived. However that may be, I proceed to consider the evidence which the appellant did lead concerning the cause of the fire.

Magagula said that Ndlela was not smoking at the time the fire started; in fact he is a non-smoker. It was put to Magagula in cross-examination that he himself, Magagula, was smoking in the forest where the fire started at the time when it started. This Magagula denied. The cross-examination on this point was based on what a witness, one Zondi, would testify. In the event, when Zondi was called, he did not give the evidence foreshadowed in the cross-examination. The

/trial ...

trial Judge accepted Magagula's evidence on this point. When Magagula was asked what caused the fire, he replied that he suspected that it was caused by the chain saw which was being used by Ndlela. He said that it had happened on a previous occasion that a chain saw started a fire. On that occasion, however, it was possible to extinguish the fire quickly.

That the use of a chain saw in a forest can cause a fire to start is clear from the evidence of the appellant's witness, Lane, who is employed by a company specialising in the sale of forestry equipment, such as chain saws. Lane explained how this can happen with reference to the particular model of chain saw that was being used by Ndlela, as testified to by Byrne. Briefly, the machine has a one-cylinder two-stroke engine, driven by a mixture of petrol and oil. It is fitted with an exhaust system containing a sealed baffle box or muffler. The outlet of the exhaust points to the front of the

/machine ...

machine, away from the operator. When in use, the machine emits hot exhaust gases emanating from the cylinder, through the exhaust outlet, with considerable force. It is possible for a deposit of carbon particles to build up in the baffle box. When that has happened, it is possible for a red-hot carbon particle to become dislodged from the baffle box and to be emitted through the exhaust outlet. If it then finds its way into dry material on the floor of the forest, it is possible for a fire to be ignited, especially if the glowing particle is fanned by wind into causing a flame. Lane said that it was possible that a fire could be caused in this way, but that it was "highly unlikely"; in his 10 years of experience in the forestry field he had encountered only one experience of a fire being caused in this fashion. He said further that if a fire was caused in this manner, he would expect to find, upon an examination of the chain saw involved, a substantial and uniform carbon

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deposit in its exhaust system. If an examination of the exhaust revealed no trace of any carbon deposit, there is no possibility at all that the chain saw could have caused a fire.

From the evidence of Gibbs, Swart and Byrne it appears that on the morning after the fire they attended a meeting of the appellant's employees, which was held to try and establish exactly what the cause of the fire was. Swart said that it was suggested (it does not appear by whom) that it could have been caused by the chain saw. Byrne was asked to bring the particular chain saw that Ndlela was using to Gibbs's office, which he did. It was decided to have the chain saw "stripped" by somebody mechanically qualified (probably one of the appellant's own mechanics), who would then furnish an opinion on whether it could have been a faulty chain saw. Swart said a report was subsequently received, and that "the matter was left there at that stage." Swart did

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not himself examine the chain saw. Nor did Byrne.

According to the latter, the chain saw was returned to him after a while, with instructions to keep it aside in case it was wanted again. At a later stage he was asked to take the muffler off and to take it to Gibbs, whom he presumed was going to have it tested. Later it was returned to him, and after some weeks he was given permission to put the chain saw back into use, which he did. When asked whether there was a carbon deposit in the machine, he replied that he could not remember. I must say that I find it strange indeed that Byrne, who was in charge of the chain saw workshop that the appellant maintained on its estate, ostensibly had no interest in ascertaining what the condition of the chain saw was, nor any memory of it. It is not necessary, however, to pursue this aspect of his evidence. What does appear from the evidence to which I have referred, as a whole, is that the appellant's employees

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caused the chain saw to be examined with a view to establishing whether its condition was such that it could have caused the fire and that they received a report on that score. Yet the appellant made no attempt at all to prove what the effect of the report was. Nor was any attempt made in the evidence placed before the trial Court to show that the appellant was unable to produce evidence of the report itself or of the condition of the chain saw. The appellant accordingly failed to prove that there was no carbon deposit in the exhaust system of the chain saw, while on the available information it could have done so, if that were the case and it had wished to do so.

The trial Judge found that "the most probable cause of the fire was the operation of Ndlela's chain saw." In my view that finding is fully justified on the evidence. In any event, it may be observed that

/that ...

that finding as to the cause of the fire is really the most favourable one that could be made, from the appellant's point of view. I say this because there is no suggestion in the evidence that the fire could have been caused otherwise than through human agency; and if it is postulated that the fire was caused neither by one of the appellant's employees having smoked in the forest (which would clearly have constituted negligence) nor by the operation of the chain saw, it would inevitably follow that the appellant had failed to furnish any explanation at all concerning the cause of the fire, which, in turn, would lead inevitably to the conclusion that it had failed to rebut the statutory presumption of negligence. The finding that the fire was caused by the operation of the chain saw involves the further finding, flowing necessarily from the evidence of Lane, referred to above, that there must have been an appreciable accumulation of carbon deposit present in the muffler of

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of the exhaust of the chain saw. (For ease of reference I shall henceforth refer to a chain saw in such a condition as a defective chain saw.) It is upon that footing that the issue of negligence must now be considered.

Lane in his evidence described the maintenance and servicing procedures in respect of chain saws, as recommended by his company. There are daily, weekly and monthly servicing procedures. I need refer only to the monthly service. Lane said that the monthly service inter alia "would entail removing the exhaust, decarboning (sic) if there was any carbon on the exhaust." Counsel for the appellant submitted that the servicing of the machine in relation to the decarbonisation of its exhaust was intended merely to ensure that it was maintained in an efficient working condition and that it had nothing to do with its safety in regard to the causing of a fire. The submission is wholly unsubstantiated by

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anything appearing from the evidence placed before the trial Court. In fact, it is refuted by the following passage in Lane's evidence:

"Are these machines used extensively in the timber industry for tree felling? --- They are.

Are they regarded as being safe for use in forest tree cutting? --- Yes, they are provided they are maintained accordingly."

Byrne, who, as I have mentioned, was in charge of the appellant's chain saw workshop, said in his evidence that the appellant's chain saws were serviced on a regular basis of a daily service, performed by the operators, and a major service after every 10 days' use, performed by the appellant's chain saw mechanics. It is quite clear from his evidence, however, that the exhaust systems of the chain saws were never inspected for the presence of carbon deposits. He explained that the exhaust "boxes" were sealed and that there was no way in which they could be opened in the appellant's workshop.

/Nowhere ...

Nowhere in his evidence in chief or under cross-examination did he suggest that the exhaust system of a chain saw was ever sent away to the agents for inspection and decarbonisation, if necessary. In his re-examination the following passage appears:

"Had you ever at any time allowed any chain saws to be sent into the field when you knew they were emitting carbon? --- No. In our 10 day service, if a port on any of the cylinders had carboned up to what we considered to be excessive, that cylinder was sent in to the agents to be decarbonised."

Byrne was here referring to the cylinder itself; he did not mention the exhaust. On his evidence, therefore, the appellant took no steps at all to ensure that its chain saws did not become defective in the sense mentioned earlier.

There is a further feature of Byrne's evidence which must be mentioned in this regard. He said that the appellant assigned a number to each of its chain

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saws, and that it kept a servicing register in which was recorded everything that was done in the case of every 10 day service in respect of each chain saw, against the appropriate number. There was no suggestion that the number assigned to the chain saw used by Ndlela could not be ascertained, or that the servicing register was not available to be produced in evidence. On the available information, therefore, the appellant could have proved exactly what servicing had been given to the chain saw in question. This it did not do. Accordingly it failed to prove that its usual servicing procedures were actually applied to the particular chain saw used by Ndlela.

There is no evidence to suggest that a substantial and uniform accumulation of carbon particles, as referred to in Lane's evidence, could have occurred so rapidly that its onset would not have been detected timeously by means of a regular inspection and servicing

of the exhaust system, such as described by Lane. It follows, then, that the appellant failed to prove that it could not have prevented the chain saw used by Ndlela from being in a defective condition.

Counsel for the appellant argued that the risk of a fire being caused by the use of a chain saw was so remote that it was not a real risk, and that the danger of a fire being caused in that way was not a reasonably foreseeable possibility. I do not agree with this argument. In support of it, counsel relied mainly on the evidence of Lane, Magagula, Gibbs, Swart and Henderson. Lane's evidence has already been mentioned. It will be recalled that he said that it was highly unlikely that a fire would be caused by a chain saw (he also described such a possibility as "remote"), and that he had had only one experience of that happening. Magagula had also had one such experience. Gibbs had had no such experience, but at the time of the fire his experience of the forestry industry was so limited that his evidence

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on this point is of no consequence. Swart had had no such experience. Henderson is a farming consultant with some experience of forestry; he said that in 20 years' experience he had not encountered a fire being started by a chain saw.

Byrne's evidence on this aspect of the case is, however, more to the point. In his career in forestry (which extended over 28 years) he had had personal experience of a fire being started by the use of a chain saw on "probably" 3 or 4 occasions. On each of those occasions, he said, it was "fortunately" a calm day, without "excessive wind" and when the conditions were not "excessively dry", so that the fire could be extinguished quickly merely by the operator stamping on it. He at first professed to be unable to say how "exactly" a chain saw could cause a fire, but an analysis of the evidence he gave thereafter reveals that he knew full well how a defective chain saw could cause a fire.

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He had himself observed in the workshop how bits of carbon particle could be blown out of the muffler in the exhaust of a chain saw, and he gave the following graphic description of what could happen in a forest:

"Now one of the requirements of harvesting is that you try and cut your tree as low as possible. You try to leave as small a stump as possible in the field so consequently what the operator does to start off with, when he's going to fell a tree, he goes along and he clears all the needles immediately around the base of that tree. So you might have a build-up of 6 inches of needles around a tree which he now clears down to ... virtually down to earth, to sand level. Then he places his chain saw and he cuts as low as possible, to cut that tree off. Now by doing that and cutting as low as possible, that exhaust is blowing down, blowing virtually directly into the needles. You've got heat, you've got gas from that exhaust and I would say if you've got those requirements, those things necessary and you get a glowing piece of carbon coming out, then I would say that you could start a fire and it could start to smoulder. It could smoulder for 5 minutes, it could smoulder for 10 minutes - I don't know.

MR. SOUTHWOOD: With the wind blowing hard?
--- You see, in a ...let's look at that place very closely. You've got that guy

/who's ...

who's cleared 6 inches of duff - what we call duff - away from the base of that tree. It might be that the stump which let's say is 4 inches high is protecting that glowing coal. Now it's smouldering, it's smouldering, it's getting a bit bigger and as the smouldering gets bigger then if the wind hits it, away it goes."

In another passage of his evidence under cross-examination the following appears:

"So if you sent a chain saw into ... now those are dangerous things presumably, chain saws throwing out carbon, are they? --- Do you mean a danger insofar ... from a fire point of view?

Yes. --- Well let's say that it must be danger because there is a possibility that that could start a fire.

So if you send a chain saw out with carbon deposit in the exhaust aperture, you're looking for trouble? --- No, I don't necessarily go along with that.

Why not? --- Because I would say that then it would depend a lot on the condition of your muffler.

Well, you've just said that bits of carbon falling from the exhaust are a potential source of fire. Now if they are present when you send a chain saw into the forest, they can fall off in the forest can't they? --- Mmm.

/So ...

So they're a potential source of fire in the forest, aren't they? --- Ja.

So it's dangerous to send a chain saw into a forest with carbon on the exhaust - in the exhaust outlet isn't it? --- Ja, but as I say, I wouldn't go along with just saying carbon on the exhaust port. What about the carbon that you get building up in your muffler?

Well let's deal with the exhaust port first shall we. Is it dangerous or is it not dangerous to send a chain saw into a forest with carbon deposits in the exhaust port? --- Well I'd say it's dangerous to send a chain saw out ... if we're going to go along and say that it's possible for a chain saw to start a fire by red hot carbon coming out of the exhaust, then we must say it's dangerous.

So your answer to my question is yes? --- Ja."

On this evidence it is clear, in my view, that the risk of a fire being caused by the use of a defective chain saw was a very real one, and the danger of a fire being caused in such a way was reasonably foreseeable. At best for the appellant, in any event, it failed to prove the contrary.

Counsel for the appellant argued next that the

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risk in question was so remote that no reasonable person would have taken steps to guard against its materialising and thus injuring other persons. The validity of this argument depends, of course, upon the consideration of two further questions: first, as to the nature of the harm that was likely to be caused to other persons, such as the respondents, if a fire broke out on the appellant's property; and second, as to the nature of the steps the appellant could have taken to prevent such harm eventuating.

As to the first question, the trial Judge said in his judgment:

"It is clearly disclosed by the evidence that the relevant employees of the defendant knew at all material times that, if a fire started in defendant's plantations in conditions such as those prevailing on the day in question, the fire would spread rapidly and that it would be almost, if not totally, impossible to contain it. In such circumstances it seems to me that the defendant's employees must have been aware that if a fire started on defendant's property there was a significantly

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grave risk that it could spread to the properties of adjoining farmers and cause damage on such properties. Aware as they were of the dangers of fire in the prevailing conditions the defendant's employees must have realised that any damage to others which might result from a fire in their plantation would be of a serious nature."

These observations are fully justified by the evidence.

In any event, once again, at best for the appellant, it has not proved the contrary.

As to the second question, it is clear from what has been said earlier in this judgment that Magagula and his fellows could not have stopped the fire from spreading, with the means at their disposal, and that the appellant's fire-fighting apparatus and procedures, however efficient in general, could not in the prevailing circumstances have been deployed in time to stop the fire from spreading. On the other hand, as pointed out earlier, there was a period of at least about an hour after the wind had attained exceptionally hazardous

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proportions, and before the fire started, in which the appellant could have taken measures to prevent the possibility of the fire being caused at all, or to ensure that if it started, it could be promptly extinguished.

The trial Judge found that there were two ways in which the appellant's employees could have taken action: they could have caused one or other of the appellant's fire-fighting units, such as one of its large tankers equipped with fire-hoses, to be present at the place where the tree-felling operations were taking place; or they could have caused the tree-felling gang to be withdrawn from its operations in the forest altogether. Counsel for the appellant criticised these findings, on the ground that it appeared from the evidence of Henderson and Melle that it was not usual in the forestry industry to adopt either of the precautions mentioned, even in the adverse weather conditions involved here. In my view the criticism is not well

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founded. In the first place, what the witnesses regarded as being usual cannot be decisive of the question, to be considered objectively, as to what precautions a reasonable person in the position of the appellant would have taken. Secondly, and more importantly, the witnesses were speaking generally and they were not invited to direct their minds to a situation where a defective chain saw was being used in the tree-felling operations. I have little doubt that, if their attention had been drawn to that circumstance, which is of crucial importance in this case, they would not have ventured disagreement with the findings of the trial Judge.

Counsel for the appellant argued also that the measures referred to by the learned Judge would have been uneconomic and accordingly could not reasonably have been expected of the appellant. This argument is without merit. The cost of a precautionary measure, in the present context, must be assessed in relation to the

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magnitude of the harm which was likely to result if it were not taken. No evidence at all was directed at such an enquiry. All that appears is a bald statement by Swart, concerning the suggestion that a fire tanker should have been available at the scene of the felling operations, that "we can't afford to do a thing like that." This obviously affords no basis for counsel's argument. Moreover, the argument loses sight of the vital fact that it was, first and foremost, the defective condition of the chain saw that Ndlela was using in the prevailing conditions that created the potentiality of a fire being started, with calamitous consequences. It is inconceivable that the cost of maintaining a chain saw in a safe condition can be of any relevance in this case.

It follows, therefore, that the appellant failed to prove that it could not, by taking reasonable precautionary measures, have prevented the damage suffered

/by ...

by the respondents. I am accordingly in respectful agreement with the following conclusion expressed by the trial Judge:

"It seems to me that where the damage likely to be caused by a fire starting in those conditions is potentially as far-reaching as the evidence disclosed it to be, a person in the position of defendant should not engage in an activity which might lead to such damage, such as tree-felling with chain-saws which are capable, if defective, of causing a fire, without first ensuring that the equipment used is maintained in a safe and efficient condition or that the means are readily at hand to extinguish any fire which might be started by the use of equipment capable of starting a fire."

In the final result, the trial Court was correct in finding that the appellant had not rebutted the statutory presumption of negligence, and in granting judgment in favour of the respondents.

The appeal is dismissed, with costs.

A.S. BOTHA JA

JOUBERT JA
HEFER JA
BOSHOFF JA
GALGUT AJA

CONCUR